UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHKIE LEE, on behalf of himself, FLSA Collective Plaintiffs and the Class, Plaintiff, v. SHUN LEE PALACE RESTAURANT, INC. d/b/a SHUN LEE PALACE, et al., Defendants.	**ECF Case** Case No: 12 CV 8653 (SHS)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

Defendants Shun Lee Palace Restaurant, Inc., d/b/a Shun Lee Palace, T&W Restaurant, Inc. d/b/a Shun Lee West, and Michael Tong ("Defendants") move to dismiss Plaintiff Johkie Lee's ("Plaintiff") First Amended Class and Collective Action Complaint because it fails to state a claim upon which relief may be granted.

Plaintiff's Amended Complaint fails to cure the many glaring deficiencies of his initial complaint. Despite being given the proverbial second bite of the apple, the Amended Complaint remains nothing more than a vague boiler plate recitation of the elements of the causes of action alleged in Plaintiff's Amended Complaint. Without any supporting factual allegations, the Amended Complaint makes claims against two restaurants (T&W Restaurant and Shun Lee Palace), that are separate corporate entities, and Michael Tong, an individual Defendant who had no direct contact with Plaintiff. In addition, Plaintiff alleges claims about all the dining room, delivery, and kitchen employees at both restaurants without citing any factual basis for having any knowledge about any of these many employees' terms and conditions of employment.

The absence of such factual allegations is not surprising since Plaintiff was a waiter at T&W Restaurant between July 2009 and June 2010 when he was fired for drinking while on duty. Plaintiff never worked at Shun Lee Palace and does not allege that he worked there. At Shun Lee Palace, unlike T&W, the wait staff is subject to the terms and conditions of a collective bargaining agreement that provides pension and employee health care coverage and different rates of pay and requires employees to become union members within 30 days of employment.

Plaintiff does not allege any facts that show that there is any interchange of employees, supervision or management between the two restaurants. Likewise, Plaintiff does not allege any facts that show that Michael Tong, the individual Defendant, has any direct contact with Plaintiff or any of the other employees at either restaurant. Thus, the Amended Complaint improperly includes Michael Tong as an individual defendant and fails to plead any facts that would support Plaintiff's conclusory allegations that Mr. Tong was his "employer," as that term is defined by the Fair Labor Standards Act and New York Labor Law.

Further, Plaintiff's complaint, even as amended, fails to adequately allege facts that could support the elements of his FLSA and NYLL claims either for himself or on behalf of other employees. For example, Plaintiff alleges minimum wage, overtime, and spread of hours violations in conclusory terms. However, he fails to allege any specifics about how much overtime he worked or how often and when he qualified for spread of hours pay despite having been provided payroll and time records during informal discovery.

Plaintiff also has still not provided any factual foundation that changes his boiler plate claims "from speculative to plausible." Likewise, there are no factual specifics about the alleged violations concerning other employees including the identity of any employee who was not paid properly or even how he would know about such alleged pay practices. The absence of such information is especially telling concerning Shun Lee Palace, where he never worked and does not allege any facts that would suggest that he has any knowledge upon which to make a *plausible* as opposed to conceivable claim for relief.

Therefore, Defendants request an order dismissing with prejudice Defendants Shun Lee Palace and Michael Tong. Defendants further request an order dismissing Plaintiff's claims on behalf of himself and other employees under both the Fair Labor Standards Act and the New York Labor Law. As Plaintiff has already had two chances to properly plead a cause of action, and failed to follow the Court's previous instructions to correct the deficiencies in his complaint, Defendants request that Plaintiff's claims be dismissed without leave to amend.

II. STATEMENT OF ALLEGATIONS IN PLAINTIFF'S AMENDED COMPLAINT[1]

A. Shun Lee Palace and T & W Restaurant are Different Employers and Very Different Restaurants

Shun Lee Palace is located in Manhattan's midtown east business district and its customers are primarily businesses and professionals working in the vicinity of the restaurant and out-of-town visitors staying at nearby hotels. *See* Am. Compl. ¶ 7 (a copy of the Amended Complaint is attached to the Goldstein Affirmation as Exhibit B). Shun Lee Palace has a formal and sophisticated atmosphere which is exemplified by its architecture, polished service, and refined cuisine.[2] Shun Lee Palace is incorporated as Shun Lee Palace Restaurant, Inc. *Id.* For several decades, the terms and conditions of employment of the waiters and bartenders at Shun Lee Palace have been governed by a collective bargaining agreement, which requires, *inter alia*, employees become union members within 30 days of employment and different rates of pay for certain employees, as well as pension and healthcare coverage.[3]

T & W Restaurant, Inc. ("T & W") is a larger, much less formal restaurant than Shun Lee Palace and its customers are primarily the pre-theater and post-theater Lincoln Center crowd and residents from the surrounding neighborhood. *See* Am. Compl. ¶ 6. T & W uses the trade name Shun Lee. *Id.* In or about 1986, T & W added Shun Lee Café from an adjacent space. Shun Lee Café is a smaller, more casual, and less expensive venue than both Shun Lee Palace and T & W

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1 For the purposes of this motion only, the material *factual* allegations asserted by Plaintiff in his First Amended Class and Collective Action Complaint are deemed to be true.

2 Evidence concerning the formation and corporate structure of Shun Lee Palace will be provided in Defendants' opposition to Plaintiff's motion for conditional certification filed on March 29, 2013 ("Defendants' Opposition").

3 Additional information and documentary evidence regarding the collective bargaining agreement between Shun Lee Palace and Local 100, UNITE HERE, International AFL-CIO and its predecessor organization will be provided in Defendants' Opposition.

and offers a lighter fare than either T & W or Shun Lee Palace and specializes in "dim sum" (Chinese dumplings).[4]

B. Facts Relating to Plaintiff's Employment with T & W

In or about July 2009, Plaintiff was hired as a waiter at T & W. *See* Am. Compl. ¶ 25. During his employment at T & W, Plaintiff alleges that he was paid at a rate of up to $4.00 per hour.[5] *Id.* at ¶ 26. Plaintiff never worked at Shun Lee Palace. *See generally* Am. Compl. Plaintiff alleges that he worked over forty (40) hours per week and over ten (10) hours per day and also that he and other putative class members were required to engage in more than twenty percent of their working time in non-tipped related activities but fails to state how often this occurred. *Id.* at ¶¶ 26, 29.

Plaintiff alleges in conclusory terms that he was an employee for FLSA purposes of both Shun Lee Palace and Michael Tong even though he never worked at Shun Lee Palace and had no direct contact with Mr. Tong. Indeed, as the evidence in Defendants' Opposition will show, Andy Ho, the General Manager of T & W, hired Plaintiff, supervised him, disciplined him for drinking while on duty, and eventually terminated him in July 2010 after he continued to drink while at work after being warned against doing so. *Id.* at ¶ 25.

C. Plaintiff Files the Instant Action

On or about November 28, 2012, Plaintiff filed his initial Complaint in the United States District Court for the Southern District of New York. (Goldstein Aff. Ex. A ("Initial Compl.")). In the Initial Complaint, Plaintiff alleges violations of the (1) Fair Labor Standards Act including

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4 Evidence concerning Shun Lee Café and the formation and corporate structure of T & W will be provided in Defendants' Opposition.

5 Documentary evidence concerning Plaintiff's rate of pay, which was provided to Plaintiff's counsel during informal discovery in an attempt to resolve this matter, will be provided in Defendants' Opposition. These records will demonstrate that contrary to the Amended Complaint, Plaintiff was paid the correct minimum wage for tipped employees ($4.65 an hour) and paid for overtime in compliance with federal and state law.

claims for unpaid overtime and minimum wages, and (2) New York Labor Law and hospitality industry wage order including claims for unpaid wages and overtime, spread of hours premium, cost of uniforms, and failure to provide proper wage statements and notices. The Initial Complaint named the following entities and individuals as Defendants: (1) Shun Lee Palace Restaurant, Inc. d/b/a Shun Lee Palace, (2) T & W Restaurant, Inc. d/b/a Shun Lee West, (3) Michael Tong, and (4) Ted Chang.

On or about January 25, 2013, Plaintiff filed a Motion for Conditional Certification and For Court Facilitation of Notice Pursuant to 29 U.S.C. § 216(b). *See* Docket Nos. 12-14. On February 13, 2013, counsel for the parties appeared before the Court for an initial scheduling conference. Defendants (1) noted the Initial Complaint's many deficiencies *inter alia*, whether Plaintiff adequately pled his claims in the Initial Complaint and whether Plaintiff's motion for conditional certification was premature, and (2) offered to produce documentary evidence including payroll records and sworn declarations from most of the waitstaff that Plaintiff's material allegations, *i.e.*, that he was not paid the proper tipped minimum wage and overtime, were false. Following the conference, the Court allowed Plaintiff until March 13, 2013 to file an amended complaint that provided specific factual allegations in support of his claims. *See* Docket No. 18. The Court also dismissed Plaintiff's motion for conditional collective certification as moot. *Id.*

On or about March 12, 2013, Plaintiff filed a First Amended Class and Collective Action Complaint ("Amended Complaint"). In the Amended Complaint, Plaintiff alleges the same causes of action that are set forth in the Initial Complaint but removed Ted Chang as a defendant. However, contrary to the Court's instructions, Plaintiff provided virtually no additional "facts" in support of his claims. Indeed, a side-by-side comparison of the Initial Complaint and Amended Complaint demonstrates the absence of any additional facts. For example, Plaintiff alleges:

Initial Complaint	**Amended Complaint**
"Upon information and belief, Defendant Michael Tong is the Chairman or Chief Executive Office of both T&W Restaurant, Inc., and Shun Lee Palace Restaurant, Inc., with an address for service of process at 525 Park Ave., 7S, New York, New York 10021 for T&W Restaurant, Inc., and 155 East 55th Street, New York, New York 10022 for Shun Lee Palace Restaurant, Inc." *See* Initial Compl., ¶ 8. "Upon information and belief, Defendant *Ted Chang* is a principal of T&W Restaurant, Inc., with a principal place of business at 43 West 65th Street, New York, New York 10023 and an address for service of process at 525 Park Ave., 7S, New York, New York 10021." *Id.* at ¶ 9 (emphasis added).	"Upon information and belief, Defendant Michael Tong is the Chairman or Chief Executive Office of Shun Lee Palace Restaurant, Inc., with an address for service of process at 155 East 55th Street, New York, New York 10022." *See* Am. Compl. ¶ 8. "Upon information and belief, Defendant *Michael Tong* is a principal of T&W Restaurant, Inc., with a principal place of business at 43 West 65th Street, New York, New York 10023 and an address for service of process at 525 Park Ave., 7S, New York, New York 10021." *Id.* at ¶ 9 (emphasis added).
"Each of the individual defendants, Michael Tong and Ted Chang exercised control . . ." *Id.* at ¶ 11.	"Michael Tong exercised control . . ." *Id.* at ¶ 11.
"Plaintiff brings claims for relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of *all non-exempt persons* employed by Defendants in *any tipped* position at any New York location on or after the date that is three years before the filing of the Complaint . . ." *Id.* at ¶ 14 (emphasis added).	"Plaintiff brings claims for relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all tipped employees, *including waiters, busboys, runners,* delivery persons, bartenders and hostesses, employed by Defendants in any tipped position at any New York location on or after the date that is three years before the filing of the Complaint . . ." *Id.* at ¶ 14 (emphasis added).

Initial Complaint	**Amended Complaint**
"Plaintiff brings claims for relief pursuant to the Federal Rules of Civil Procedure ("F.R.C.P.") Rule 23 *on behalf of all non-exempt persons employed by Defendants* on or after the date that is six years before the filing of the Complaint in this case as defined herein (the "Class Period") *Id.* at ¶ 17 (emphasis added).	"Plaintiff brings claims for relief pursuant to the federal Rules of Civil Procedure ("F.R.C.P.") Rule 23, *on behalf of all non-exempt persons, including waiters, busboys, runners, delivery persons, bartenders, hostesses, cashiers, cooks, dishwashers, food preparers and porters, employed by Defendants* on or after the date that is six years before the filing of the Complaint in this case as defined herein (the "Class Period"). *Id.* ¶ 17 (emphasis added).
"Plaintiff and Class members did not receive any notice that Defendants were taking a tip credit. In addition, they did not receive any notice as to the amount of tip credit allowance taken for each payment period during their employment. They were also never informed in writing as to their hourly rate of pay and overtime rate of pay." *Id.* at ¶ 28.	"Plaintiff did not receive any notice. Class members did not receive any notice that Defendants were taking a tip credit *until various times starting in 2011. However, even then, such tip credit notices did not satisfy statutory requirements. Prior to 2012, employees also were not provided with written notices as to their hourly rate of pay and overtime rate of pay.*" *Id.* at ¶ 28. (emphasis added).

Without providing any specific factual allegations, Plaintiff combines all of the following generalized and conclusory statements about his various federal and state wage and hour and labor law violations against two separate corporate defendants and the individual defendant. [6]

- "At all relevant times, Plaintiff and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subjected to Defendants decisions, policies, plans, programs, practices, procedures, protocols, routines, and rules, all culminating in a willful failure and refusal to pay them the proper minimum wage and overtime premium at the rate of one and one half times the regular rate for work in excess of

[6] In support of Defendants' Opposition, Defendants have sworn declarations from the waitstaff of T & W and Shun Lee directly refuting all of Plaintiff's allegations in the Amended Complaint. For example, the declarations state that the members of the waitstaff were paid for all hours worked including the spread of hours premium, received notice of the tip credit, each restaurant provided different uniforms for different categories of employees and that the uniforms between the two restaurants differed, and that the waitstaff did not have to pay for the cleaning and maintenance of their uniforms. As with Plaintiff's pay records, these declarations were provided to counsel for Plaintiff during informal discovery in an attempt to resolve this matter.

forty (40) hours per workweek. The claims of Plaintiff stated herein are essentially the same as those of the other FLSA Collective Plaintiffs. Specifically, Plaintiff and FLSA Collective Plaintiffs claim that Defendants willfully violated Plaintiff's and FLSA Collective Plaintiff's rights by failing to pay their minimum wages in the lawful amount for hours worked. Defendants, however, were not entitled to take any tip credit under the FLSA, because they failed to properly provide notice to all tipped employees that Defendant were taking a tip credit." Am. Compl. ¶ 15.

- That Plaintiff and all other members of the putative classes were "subject to the same corporate practices of Defendants, as alleged herein, of (i) failing to pay overtime compensation and 'spread of hours' premium and (ii) improperly deducting from Class members' compensation the cost of uniforms. In addition, a subclass of Class members who were tipped employees suffered from Defendants' failure to pay minimum wage (based on Defendants' invalid tip credit)." *Id.* at ¶ 20.

- "Defendants' corporate-wide policies and practices affected all Class members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts to each Class member. Plaintiff and other Class members sustained similar losses, injuries and damages arising from the same unlawful policies, practices and procedures." *Id.* at ¶ 20.

The following allegations concerning overtime, spread of hours, and uniform reimbursement are equally devoid of any specifics about the category of employees allegedly affected, the frequency of the alleged practice or even the manner in which the law was allegedly violated.

- Without providing details as to the schedules or hours worked by other employees or even the group of employees he is referring to, Plaintiff alleges that

  > "Plaintiff, the FLSA Collective Plaintiffs, and members of the Class often worked in excess of forty hours per week. The workdays of Plaintiff, the FLSA Collective Plaintiffs, and members of the Class regularly exceeded ten hours." *Id.* at ¶ 31.

- Without providing any specifics such as frequency or group of employees, Plaintiff alleges that

  > "[His] and Class members' workday regularly exceeded ten (10) hours" and as such, Defendants failed to pay the New York State "'spread of hours' premium to Plaintiff and Class members." *Id.* at ¶ 57; *see also id.* at ¶ 36.

Plaintiff also alleges in conclusory terms and without any specific facts that Michael Tong is the "principal of T&W Restaurant, Inc." and the "Chairman or Chief Executive Officer of Shun Lee Palace Restaurant, Inc." and that he "exercised the power to (i) fire and hire, (ii) determine rate and method of pay, (iii) determine employee work schedules, and (iv) otherwise affect the quality of employment." *See* Am. Compl. ¶¶ 8, 9, 11. Plaintiff also alleges, without any factual basis, that Tong "had the power and authority to supervise and control supervisors of Plaintiff, the FLSA Collective Plaintiffs and the Class members." *Id.* at 11.

III. ARGUMENT

A. Plaintiff Must Do More Than Set Forth Vague and Conclusory Allegations and Recitations of the Elements of His Claims

FRCP 8(a)(2) requires "a short and plain statement of the claim *showing* that the pleader is entitled to relief." (emphasis added). A motion to dismiss for failure to state a claim upon which relief may be granted challenges the legal sufficiency of the complaint — that is, to survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, '*to state a claim to relief that is plausible on its face*,'" *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010), and "a [p]laintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

As the Supreme Court stated in *Twombly*, "naked assertion[s]" devoid of "further factual enhancement" are insufficient to sustain a claim, and a complaint that offers mere "labels and conclusions" should be dismissed. *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966. Thus, "[l]egal conclusions and threadbare recitals of the elements of a cause of action" will not suffice to state a claim, as "Rule 8…does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

In testing the sufficiency of a complaint, the Supreme Court instructs that a court should first identify those allegations which are nothing more than legal conclusions which may be disregarded because "they are not entitled to the assumption of truth". *See Iqbal*, 129 S. Ct. at 1950. Then, the Court should determine whether the remaining factual allegations support a "*plausible claim for relief*." *Iqbal*, 129 S. Ct. at 1950 (emphasis added). The Supreme Court emphasized that this inquiry is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to determine whether the claim is plausible. *Id.* Once the court has stripped away the conclusory allegations, it must determine whether the complaint sets forth "well pleaded *factual* allegations . . . [that] *plausibly* give rise to an entitlement to relief." *Id*. The plausibility standard asks "for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. If, after disregarding a plaintiff's legal conclusions and taking the original complaint's factual allegations as true, a lawful alternative explanation appears as the "more likely" cause of the complained behavior, the claim for relief is not plausible and should be dismissed. *Id.*

B. Plaintiff's Claims Against Shun Lee Palace Should Be Dismissed Because It Was Not Plaintiff's Employer

Plaintiff's claims against Shun Lee Palace should be dismissed because he never worked there and Shun Lee Palace was not his employer. The FLSA imposes liability on an "employer," which is defined as an entity "acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 203(d). "An employment relationship exists under the FLSA when the economic reality is such that the alleged employer possessed the power to control the workers in question." *Paz v. Piedra*, 09 Civ. 03977, 2012 U.S. Dist. LEXIS 4034, at *20-24 (S.D.N.Y. Jan. 12, 2012) (citing *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)). Under the economic realities test, relevant factors include "whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." *Herman*, 172 F.3d at 139 (citations and quotations omitted).

The Second Circuit has provided additional factors to consider in applying the economic realities test, including: (1) whether the alleged employer's premises and equipment were used for plaintiff's work; (2) whether plaintiff shifted from one employer's premises to that of another; (3) the extent to which the work performed by plaintiff was integral to the overall business operation; (4) whether plaintiff's work responsibilities remained the same regardless of where he worked; (5) the degree to which the alleged employer supervised plaintiff's work and (6) whether plaintiff worked exclusively or predominantly for one defendant. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003).

When two or more entities operate as joint employers, "each employer is jointly and severally liable to those affected employees for the FLSA violations of all other joint employers." 29 C.F.R. § 791.2; *Paz*, 2012 U.S. Dist. LEXIS 4034, at *15-16. A joint employment relationship, however, does not exist if each employer acts "entirely independently of each other and are completely disassociated with respect to the employment of a particular employee." 29 C.F.R. § 791.2. In determining whether two or more entities are joint employers, the main factor is whether the entities exercised sufficient control over the Plaintiff, which is determined through the economic realities test and is applicable to both FLSA and NYLL claims. *See Wolman v. Catholic Health System*, 853 F. Supp. 2d 290, 298 (E.D.N.Y. 2012); *Slamna v. API Rest. Corp.*, 12 Civ. 757, 2012 U.S. Dist. LEXIS 102043, at *8 (S.D.N.Y. July 18, 2012).

Here, Plaintiff alleges that "Defendants operated the two Shun Lee restaurants as a common enterprise, each of the restaurants shared common ownership, were marketed jointly, shared common names, and employees and resources were interchangeable between the two restaurants." Am. Compl. at ¶ 10. Plaintiff's allegations are directed towards "Defendants" generally and lack specifics as to any particular Defendant named in the Amended Complaint. Indeed, there are absolutely no factual allegations that even hint that Plaintiff had an employment relationship with either Shun Lee Palace, let alone Michael Tong.

Further, these allegations miss the mark in that they are irrelevant to joint employer liability. "Allegations of common ownership and common purpose, without more, do not answer the fundamental question of whether each corporate entity controlled Plaintiff[] as [an] employee[]." *Lopez v. Acme Am. Environmental Co., Inc.*, 12 Civ. 511, 2012 U.S. Dist. LEXIS 173290, at *11 (S.D.N.Y. Dec. 6, 2012). Plaintiff completely fails to address whether Shun Lee Palace had any power to hire, fire, control or determine the pay of the employees of T & W or whether Shun Lee Palace kept employment records for T & W. For example in *Paz*, 2012 U.S. Dist. LEXIS 4034, at *20-24 the Court rejected the plaintiff's argument that the four defendant restaurants, each a separate legal entity, jointly employed all plaintiffs and class members. In doing so, the Court relied on the absence of any allegation that one restaurant could fire, hire, control, supervise, or determine the compensation of the employees of another or that one restaurant maintained personnel records of another's employees.

The Court in *Paz* explained that "the mere fact that each [restaurant] is owned in whole or major part by the same persons simply does not permit this Court to disregard their distinct legal statuses." *Paz*, 2012 U.S. Dist. LEXIS 4034, at *20-24; *see also Wolman*, 853 F. Supp. 2d at 298 (explaining that "general commonalities between Defendants" do no establish control such that joint employment is adequately plead); *Slamna*, 2012 U.S. Dist. LEXIS 102043, at *12-14 (dismissing two defendant restaurant entities where plaintiffs never alleged they were employed by the two restaurants, plaintiff provided no factual allegations concerning wage and hour violations on the part of the two restaurants, and explaining that "if one entity did not pay an employee for overtime, that is an insufficient basis for holding all affiliated entities liable"). Accordingly, Plaintiff's allegations are completely devoid of the facts required to state a joint employer claim.

C. Plaintiff's Claims Against Michael Tong Should Be Dismissed Because Mr. Tong Was Not Plaintiff's Employer

The "economic reality test" described above also applies in determining whether a corporate officer or director is a joint employer. *See Wolman*, 853 F. Supp. 2d at 299. Plaintiff claims that Mr. Tong is liable as a joint employer because he is both the Chairman or CEO of Shun Lee Palace as well as the principal of T & W and that he had the "power and authority to (i) fire and hire, (ii) determine rate and method of pay, (iii) determine employee work schedules, (iv) maintain employee records and (v) otherwise affect the quality of employment." Am. Compl. at ¶¶ 8, 9 & 11. There are absolutely no concrete facts in the Amended Complaint to support these allegations.[7] The Amended Complaint only alleges in conclusory terms that Mr. Tong had the "power and authority" to perform a litany of supervisory activities. However, Plaintiff fails to allege any facts that Mr. Tong actually engaged in any of those activities. *See, e.g.*, *Pazos v. Le Bernardin Inc.*, No. 11 CV 8360 (S.D.N.Y. Apr. 27, 2012) (dismissing claims against two individual named restaurateurs because the plaintiff offered only conclusory allegations as to their power to hire, fire, and set forth no facts regarding frequency of interaction with the putative class or control over the putative class) attached to Goldstein Aff. as Exh. C.

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[7] As the evidence in Defendants' Opposition will show, Mr. Tong has no role in the day-to-day operations of either T & W or Shun Lee Palace and does not set the terms and conditions of employment for the staff at either restaurant. Rather, Mr. Tong leaves the day-to-day management of T & W and Shun Lee Palace to their respective general managers.

Equally glaring is Plaintiff's failure to allege any facts that show Plaintiff had any direct contact with Mr. Tong let alone that Mr. Tong hired or fired Plaintiff or even supervised him.[8] The absence of these essential factual allegations warrant dismissal of the claims against Tong. *See Wolman*, 853, F. Supp. 2d. at 299 (dismissing individual defendant where plaintiff failed to allege that the individual defendant ever had any direct contact with the plaintiff, such as personally supervising the plaintiff's work schedule or tasks, signing the plaintiff's paycheck, or directly hiring the plaintiff"); *Diaz v. Consortium for Worker Education, Inc.*, 10 Civ. 01848, 2010 U.S. Dist. LEXIS 107722 (Sept. 28. 2010) (granting dismissal of case and explaining that allegations that defendant supervised and controlled employees by "indirectly controlling the method, rate, and time of payment of salaries" of employees were conclusory allegations insufficient to survive a motion to dismiss).

Thus, since the Amended Complaint fails to allege any specific facts that Mr. Tong ever exercised any power over the terms and conditions of employment for Plaintiff or any of the employees, the claims against Mr. Tong should be dismissed.

D. Plaintiff's Vague and Conclusory Allegations are Insufficient to State Plausible Claims for Unpaid Overtime, Minimum Wage, Spread of Hours Premium, Inaccurate Pay Stubs, and Uniform Care Expenses

Plaintiff's complaint, even as amended, fails to adequately allege the elements of his FLSA and NYLL claims. Plaintiff has still not provided any factual foundation that might "nudge" his allegations "from speculative to plausible." Instead, his Amended Complaint is full

[8] As the evidence in Defendants' Opposition will show, Plaintiff was hired, supervised, disciplined and eventually fired by the General Manager Andy Ho, and Plaintiff had no contact with Mr. Tong.

of vague and conclusory allegations, legal conclusions and a recitation of the elements of his claims. Thus, the Court can do nothing more than speculate as to the viability of his claims.

1. Overtime

First, Plaintiff fails to sufficiently allege, as he must, that he worked more than 40 hours in a particular workweek for which he did not receive overtime. *Lundy v. Catholic Health Sys.*, No. 12-1453, 2013 U.S. App. LEXIS 4316, at *15 (2d Cir. Mar. 1, 2013). In order to plead a claim for unpaid overtime under the FLSA and the NYLL, a plaintiff must plead the following elements: "(1) the existence of an employer-employee relationship between the parties, (2) the existence of some kind of interstate activity in the employee's work, (3) the approximate number of unpaid overtime hours worked, and (4) in cases where a plaintiff brings an FLSA claim on behalf of other similarly situated employees, an indication of who these other employees are and the facts entitling them to relief." *Walz v. 44 & X Inc.*, No. 12 Civ. 5800 (CM), 2012 U.S. Dist. LEXIS 161382, *9 (S.D.N.Y. Nov. 7, 2012) (granting motion to dismiss overtime claims for failure to adequately plead when and how much unpaid overtime the plaintiffs worked; noting the standard for bringing a claim under the NYLL is "substantially the same as the FLSA").

The Second Circuit Court of Appeals has recently emphasized that FLSA plaintiffs are required to plead specific facts showing alleged overtime violations on particular occasions. Thus, Plaintiff is required to "sufficiently allege 40 hours of work *in a given workweek* as well as some uncompensated time in excess of the 40 hours." *Lundy*, 2013 U.S. App. LEXIS 4316, at *15 (emphasis added). In *Lundy*, one plaintiff alleged that she "*occasionally* worked an additional 12.5-hour shift," "*typically*" missed meal breaks, and worked uncompensated time before or after "*typically*" resulting in extra time per shift. *Id.* at *16-17 (emphasis added). A second named plaintiff alleged that "approximately twice a month she worked five to six shifts . . . totaling between 37.5 and 45 hours." *Id.* at *17-18. Neither of them identified any specific week for which they were owed unpaid overtime. *Id*. at *16-18. The Second Circuit Court concluded this was insufficient to state a claim for overtime because the plaintiffs failed to allege a "single workweek in which they worked at least 40 hours and also worked uncompensated time in excess of 40 hours." *Id*. at *16.

The District Courts in New York have similarly held that such vague and conclusory allegations do not satisfy FRCP 8. In one such case, the Southern District dismissed the plaintiffs' overtime claims where they alleged only the "'*typical*' or '*approximate*' number of hours per week they worked without proper compensation," but failed to allege "the actual date for even a single instance of unpaid work." *Nakahata v. N.Y. Presbyterian Healthcare Sys., Inc.*, Nos. 11 Civ. 6658(PAC), 11 Civ. 6657(PAC), 11 Civ. 6366(PAC), 2012 U.S. Dist. LEXIS 127824, at *6-8, 14-16 (S.D.N.Y. Sept. 6, 2012) (emphasis added). Although the court recognized that the plaintiffs were "not required to state every single instance of overtime worked or to state the exact amount of pay which they were owed," their allegations fell short because their vague allegations did not specify which weeks any of the alleged unpaid wages were earned or even the approximate number of hours allegedly worked without compensation. *Nakahata*, 2012 U.S. Dist. LEXIS 127824, at *14.

In a similar case, the Eastern District of New York dismissed a complaint alleging that plaintiffs "regularly worked . . . in excess of forty per week and were not paid for all of those hours" due to three alleged unlawful policies and practices including the employer's automatic meal period deduction, unpaid pre- and post-schedule work policy and unpaid training. *DeSilva v. North Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 507-08 (E.D.N.Y. 2011). Although the complaint identified the plaintiffs' positions, time periods and locations they worked, it did not identify specific enough information to support a plausible claim under the FLSA or NYLL. *Id*. at 508-09. The plaintiffs did not plead any factual allegations to show "when the alleged unpaid wages were earned . . . or the number of hours allegedly worked without compensation." *Id*. at 509. They also failed to plead sufficient allegations to support their claims that the employer had in place unlawful policies regarding pre- and post- shift work and unpaid trainings. *Id*. at 510.

In this case, the Amended Complaint contains a conclusory allegation that "Defendants unlawfully failed to pay the Plaintiff . . . one-and-one-half times New York State and federal minimum wage for hours they worked over 40 in a workweek." Am. Compl. ¶ 32. The Amended Complaint does not allege *how* or in *what manner* Defendants improperly paid Plaintiff overtime. Nor does it allege *how frequently* or *when* Plaintiff worked uncompensated overtime. Instead, the Amended Complaint states only that "*[t]ypically*, Plaintiff worked five days per week for 10-12 hours per day." *Id*. at ¶ 26 (emphasis added). Plaintiff does not specify which weeks or how often Defendants failed to pay him overtime. Indeed, he fails to allege even a *single instance or single work week* in which he allegedly worked uncompensated overtime. As was true in the above-described decisions, Plaintiff's conclusory and vague allegations fail to allege his FLSA and NYLL claims with sufficient particularity. *See also Acosta v. Yale Club of New York City*, 1995 U.S. Dist. LEXIS 14881, at *10 (S.D.N.Y. Oct. 12, 1995) (dismissing FLSA claim where "[p]laintiffs cite various instances when they worked several extra hours in a given day," but "do not offer any examples of situations when management employed them for more than 40 hours in a week without paying them overtime"). The absence of any particularized allegations is especially egregious since Plaintiff was given his pay records during informal discovery.

2. Spread of Hours

Similar to his overtime claim, Plaintiff fails to plead *how frequently* or *when* he allegedly worked more than 10 hours in a workday but did not receive a "spread of hours" premium. Nor does he provide any approximation for *how many days* he was denied a "spread of hours" premium. Instead, the Amended Complaint merely alleges that he regularly worked more than 10 hours in a work day and then recites the element of his claim that "Defendants willfully . . . fail[ed] to pay 'spread of hours' premium to Plaintiff . . . for each workday that exceeded ten (10) hours." Am. Compl. at ¶ 57. He provides absolutely no factual foundation for this claim.

3. Notice of Pay

Plaintiff's tip credit/minimum wage claim is also impermissibly vague as it provides insufficient factual allegations to show *how* Defendants failed to comply with statutory requirements. The Amended Complaint alleges that Defendants could not take a tip credit from Plaintiff's pay because they did not provide him with proper notice. Am. Compl. at ¶ 28. Plaintiff concedes that notice was provided no later than 2011 but alleges the notice provided "did not satisfy statutory requirements." *Id.* However, the Amended Complaint does not give the Court a clue why the notice did not meet the statutory requirements. Indeed, it does not contain any information at all about the manner or content of the notice that was provided to employees and why it is allegedly defective. *Id.*

In the same vein, Plaintiff alleges in only a conclusory fashion that the paystubs issued to him and the putative class member "did not accurately reflect their working hours." Am. Compl. at ¶ 27. Once again, the Amended Complaint does not allege in *what manner*, *how often* or *during what time period* the paystubs did not accurately reflect their working hours. *Id.* Similarly, the Amended Complaint fails to provide any facts to substantiate Plaintiff's cursory one-sentence allegation that the paystubs "failed to disclose the proper overtime rate of pay." *Id.*

at ¶ 36. The Amended Complaint also does not specify in *what manner* the overtime rate was misstated, *how often* or *for what period of time*.

4. Uniform Care

Plaintiff also fails to state a claim for reimbursement for the cost of cleaning and maintaining his uniforms. *Id.* at ¶ 30. The Amended Complaint provides absolutely no information about the manner in which he was allegedly required to clean and maintain his uniforms nor the costs incurred. Employees are only entitled to reimbursement for the cost of caring for and maintaining uniforms when the uniforms require special care such as dry cleaning. *See* Department of Labor, Wage and Hour Division Opinion Letter No. 1564, C.C.H ¶ 31, 371, 1981 DOLWH LEXIS 7, **1-2 (1981) ("for those uniforms of 'wash and wear' material requiring only washing and tumble or drip drying which may be laundered with other personal garments, a uniform maintenance reimbursement will not be required"). Plaintiff has not alleged that he was required to use any special care to launder his "white shirt and apron". *Id.*

Despite being allowed a second opportunity to adequately plead plausible claims for relief, Plaintiff elected to make only nominal changes to his pleading. Although this Court indicated that Plaintiff's original Complaint was impermissibly vague, Plaintiff has still failed to correct these deficiencies. Plaintiff should not be allowed to proceed with these inadequate claims nor should the Court countenance his repeated failure to properly state his claims, especially given the detailed information and payroll records he received during informal discovery. Indeed, Plaintiff's failure to amend his Complaint to correct his pleading that the Plaintiff received a pay rate from $4.00 (as alleged in the Complaint) to $4.65 (as demonstrated by the payroll records) violates his obligation under Rule 11. Accordingly, Defendants request an order dismissing Plaintiff's claims for overtime, "spread of hours" premium, minimum wage, paystubs and reimbursement for the care of his uniforms.

E. Plaintiff Has Not Alleged Sufficient Facts to State Plausible Claims for Unpaid Overtime, Minimum Wage, Inaccurate Pay Stubs and Uniform Care Expenses on Behalf of Other Employees

Even more striking than the deficiencies in his own claims, Plaintiff woefully fails to provide any factual allegations creating a "plausible" entitlement to relief for any other employee. The Amended Complaint alleges in a conclusory manner that he and all other employees from all non-exempt positions, including numerous different job positions and work locations, were "subject to the same corporate practices of Defendants." Am. Compl. ¶ 20. Given that he is seeking to represent a broad and diverse range of positions from two separate legal entities at different locations, all with different job functions, hours, rates of pay, and daily tasks, his conclusory allegation that they *were all subject* to the same "corporate practices" is implausible. The allegations concerning Shun Lee Palace having the same corporate practices as T & W is especially implausible since the employees at Shun Lee Palace are covered by a Union contract that spells out different terms and conditions of employment. Indeed, Plaintiff fails to provide any factual information, as opposed to merely conclusory statements, that could potentially support a viable claim for any of the Restaurant's other employees. The complete lack of factual foundation for these claims speaks loudly that he in fact has no knowledge of the terms and conditions of other employees, particularly those working in different jobs and different restaurants.

The Amended Complaint provides absolutely no facts to support overtime claims on behalf of other employees. As Plaintiff seeks relief on behalf of other employees, he is required to provide "an indication of who these other employees are and the facts entitling them to relief." *Walz v. 44 & X Inc.*, No. 12 Civ. 5800 (CM), 2012 U.S. Dist. LEXIS 161382, *9 (S.D.N.Y. Nov. 7, 2012). He fails to do so. First, the Amended Complaint is deficient to the extent that it fails to identify the respective employers for the various employees, job positions and work locations allegedly included in the putative class. *Nakahata v. N.Y. Presbyterian Healthcare Sys., Inc.*, Nos. 10 Civ. 2661(PAC), 10 Civ. 2662(PAC), 10 Civ. 2683(PAC), 2011 U.S. Dist. LEXIS 8585, at *22 (S.D.N.Y. Jan. 28, 2011) (granting motion to dismiss complaint "due to the failure to specify which entity, among the many named defendants, employed the respective plaintiffs"). Second, the Amended Complaint fails to identify a single employee that was subject to the alleged unlawful behavior. *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 630-31 (S.D.N.Y. 2007) (granting employer's motion to dismiss FLSA claims filed on behalf of other unidentified employees where the complaint "neither generally nor specifically name[d] or referenced any other plaintiffs" and did not plead any facts substantiating any policy leading to unpaid overtime). Third, the Amended Complaint fails to allege any *facts* regarding other employees' *work hours*, *when* or *how* other employees worked uncompensated overtime, *how frequently* they were denied proper overtime and *under what circumstances*.

1. Minimum Wage and Overtime

The Amended Complaint avers in the most cursory manner that "the FLSA Collective Plaintiffs, and members of the Class *often* worked in excess of forty hours per week" and that "Defendants unlawfully failed to pay . . . the FLSA Collective Plaintiffs, and members of the Class one-and-one-half times New York State and federal minimum wage *for hours they worked over 40 in a workweek*." *Id*. at ¶¶ 31-32. The case law is clear that such factually devoid allegations are patently insufficient to create a "plausible" entitlement to relief for other employees. *Wilson v. Pioneer Concepts, Inc.*, No. 11-cv-2353, 2011 WL 3950892, at *3 (N.D. Ill. Sept. 1, 2011) (granting motion to dismiss class allegations because no plausible FLSA claim was stated on behalf of other employees where complaint alleged unidentified employees worked an unidentified number of extra hours during lunch breaks and had an unspecified amount of time rounded off to their detriment at the time clock; and that some of those employees may have worked overtime without proper pay); *Landry v. Peter Pan Bus Lines, Inc.*, No. 09-11012-RWZ, 2009 U.S. Dist. LEXIS 129873, at **3-4 (D. Mass. Nov. 20, 2009) (dismissing class allegations where complaint failed to plead any facts about how other employees were denied overtime); *Williams v. Skyline Automotive Inc.*, No. 11 Civ. 4123(SAS), 2011 WL 5529820, at *2 (S.D.N.Y. 2011) (noting failure to include approximation of uncompensated overtime worked and specific facts regarding dates of employment, pay and positions undermines plausibility of claim where a complaint alleges that multiple defendants permitted a diverse group of plaintiffs to perform uncompensated work during breaks or after hours).

2. Spread of Hours

Plaintiff's claim on behalf of other employees for the "spread of hours" premium is similarly vague and conclusory. The only information provided to support such a claim on behalf of other employees is Plaintiff's mere boilerplate recitation of the elements of this claim. The Amended Complaint states only that "Class members' workday regularly exceeded ten (10) hours." Am. Comp. at ¶ 57. It further states that Defendants "fail[ed] to pay 'spread of hours' premium to . . . Class members for each workday that exceeded ten (10) hours." *Id*. There are no allegations, however, about the *manner* in which they were denied spread of hour premiums, *how frequently* or *when* they worked more than 10 hours in a workday but did not receive a "spread of hours" premium. *Id*.

3. Tip Credit Notice and Job Duties

Plaintiff's tip credit/minimum wage claim also fails to provide sufficient information regarding other employees. Again, the Amended Complaint does not allege any facts about how the notice of the tip credit was provided or how specifically it failed to comply with statutory requirements. Am. Comp. ¶ 28. Additionally, the Amended Complaint does not plead facts regarding the alleged unrelated duties that allegedly consumed more than 20% of all the various tipped employees working time. For example, the Amended Complaint does not allege any facts regarding any of the work functions for the various positions. *Id*. Instead, the Amended Complaint only alleges in a conclusory fashion that "Plaintiff and other tipped employees were required to engage more than 20% of their working time in non-tipped related activities such as: preparing food, cleaning the kitchen, cleaning the restaurant and other non-tip related activities." *Id.*

This allegation is fatally vague. For example, it does not specify what duties the delivery workers or hostesses did as opposed to the alleged duties of the waiters, runners or bussers. Indeed, some of these duties appear to be germane to certain of the diverse positions identified. The Amended Complaint also fails to allege the "dual jobs" or "non-tipped occupations" employees allegedly performed for which Defendants would not have been entitled to take a tip credit. *See*, *e.g*., 29 C.F.R. § 531.56 (providing that tip credit prohibited where employee works "dual job" comprised of non-tip related duties); 12 NYCRR § 146-2.9 (providing 20% limitation when workers are employed in "non-tipped occupations").

4. Pay Stubs and Uniform Care Expenses

The claims asserted on behalf of other employees for inaccurate paystubs and uniform expenses suffer from the same infirmities as Plaintiff's own individual claims. The Amended Complaint fails to specify in what manner the paystubs provided inaccurate work hours or overtime. *See* discussion *supra* at p. 18. The Amended Complaint also fails to plead any facts suggesting any special care was required for uniforms. *See* discussion *supra* at pp. 19-20.

In sum, the Amended Complaint fails to state sufficient facts establishing any plausible claims on behalf of other employees. It is apparent from the face of the Amended Complaint that Plaintiff lacks knowledge regarding the broad range of job positions and restaurants locations he seeks to represent and that his conclusory allegations that both employees at all locations in all positions were subject to the same "corporate practices" is simply not plausible. Defendants therefore request a dismissal of all claims asserted on behalf of other employees.

IV. CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's Amended Complaint should be granted.

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